SERVED: May 26, 1994

NTSB Order No. EA-4172

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 14th day of May, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. WILLIAM V. BROWN, Respondent.	Docket SE-12347

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued on June 2, 1992, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator suspending respondent's airline transport pilot certificate.[2] The Administrator alleged, and the

[1]The initial decision, an excerpt from the hearing transcript, is attached.

[2]The Administrator sought a 180-day suspension of

law judge found, that respondent violated 14 C.F.R. 91.29(a), 91.165, 91.167(a)(1) and (2), and 91.9.[3] We grant the appeal only to the extent that we dismiss the § 91.165 charge pursuant to the Administrator's withdrawal of it (see Reply at footnote 19). We affirm the other regulatory violations found by the law judge, and affirm the 120-day suspension.

(..continued)
respondent's certificate. The law judge reduced the suspension to 120 days, and the Administrator has not appealed that modification of his order.

[3]§ 91.29(a), now § 91.7(a), read:

> No person may operate a civil aircraft unless it is in an airworthy condition.

§ 91.165, Maintenance required (now 91.405), as pertinent, read:

> Each owner or operator of an aircraft -
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> (a) Shall have that aircraft inspected as prescribed in Subpart E of this part and shall between required inspections, except as provided in paragraph (c) of this section, have discrepancies repaired as prescribed in part 43 of this chapter;
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> (b) Shall ensure that maintenance personnel make appropriate entries in the aircraft maintenance records indicating the aircraft has been approved for return to service[.]

§ 91.167(a)(1) and (2), now 91.407(a)(1) and (2), read:

> (a) No person may operate any aircraft that has undergone maintenance, preventive maintenance, rebuilding, or alteration unless -
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> (1) It has been approved for return to service by a person authorized under § 43.7 of this chapter; and
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> (2) The maintenance record entry required by § 43.9 or § 43.11, as applicable, of this chapter has been made.

§ 91.9 (now 91.13(a)) provided:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Respondent was the pilot in command of a cargo carrying, Part 135 flight operated by Richardson Aviation. Due to adverse weather during a flight on February 17, 1989, respondent was diverted to Spokane International Airport. On landing, the aircraft (a Mitsubishi MU2B-35) veered off the runway and was damaged. Two days later, on Sunday, February 19, and after some work had been performed on it, respondent flew the aircraft to Seattle to reposition it for continued cargo operations. In March, the FAA's Principal Maintenance Inspector for Richardson Aviation saw the aircraft for the first time since the incident and grounded it for unairworthiness. Tr. at 81 and 226. Respondent does not directly contest the Administrator's allegations that, following the accident, the aircraft was not airworthy and the repairs accomplished in Spokane did not actually make it so.

Respondent raises numerous alleged errors in the law judge's decision, all but one of which are issues of law. Ultimately, the issues of fact here depend on a credibility assessment. That is, according to the Administrator, respondent was advised not to fly the aircraft because it was dangerous. According to respondent, however, he had no reason to think that the aircraft was not airworthy. The law judge resolved the credibility issues in favor of the Administrator's witnesses, and respondent offers no good reason to reject the law judge's analysis.

The Administrator presented testimony by two mechanics that the aircraft was seriously damaged. One of the mechanics, Mr.

Philip Wells (who had worked for Richardson Aviation and was asked by Gina Richardson to help with this aircraft), testified to having strongly advised respondent not to fly the aircraft before other tests and work on it could be done. The other mechanic confirmed hearing this discussion.[4] The testimony of these mechanics was extremely detailed, and disagreed with that of respondent in many respects. Most notably, respondent testified that he was advised that something was wrong with the propeller but was not told of any other problems. Tr. at 163.

Respondent, on appeal, suggests that Mr. Wells was not credible because he testified that he could see propeller nicks from 40 feet in the dark, and because his services had been terminated by a Part 135 operator. We disagree. Respondent misstates the evidence. Mr. Wells testified that he first observed the aircraft at twilight, with the hangar doors wide open, and the sun setting behind him, directly hitting the aircraft's front. Tr. at 50. In these circumstances, it would not be incredible that an experienced mechanic could spot visible

[4]The mechanics were concerned especially about the possibility that foreign matter (pieces of the runway lights) had been ingested into the right engine and that there was internal damage to a propeller. See Exhibits C-8 and C-9 (statements of mechanic John Slater). They also were concerned about a hole in the pressure vessel, affecting the aircraft's ability to pressurize, and damage to the aircraft's skin.

Although respondent challenges the use of Exhibits C-8 and C-9 because Mr. Slater did not testify, we agree with the law judge's acceptance of them. Respondent had the opportunity to depose or subpoena Mr. Slater and chose not to do so. Hearsay evidence is admissible, with the judge giving it what weight he thinks it is entitled. Administrator v. Howell, 1 NTSB 943, 944 at n. 10 (1970).

propeller damage. Moreover, as the Administrator notes, respondent is not in a position to judge how much light was available when he, admittedly, did not visit the aircraft in the hangar until the next day. Reply at 25. The fact remains, unrebutted by respondent, that the propeller was nicked and that Wells did not have equipment or facilities at the hangar to determine its structural integrity.

If respondent's reference to Mr. Wells being fired refers to his job with Richardson Aviation (and we see no other possibility in the record), the unrebutted evidence indicates that Mr. Wells was not fired by Richardson Aviation but quit due to disagreements with Ms. Richardson regarding maintenance standards. Tr. at 25, 44. We see no basis to overturn the law judge's findings of fact here.

Respondent's legal arguments can be grouped into three categories: 1) applicability of the Part 91 rules cited by the Administrator; 2) admissibility of a tape recording made by Mr. Wells that supports his version of events; and 3) a mechanic's obligation to disclose the aircraft's unairworthiness by disapproving an aircraft for return to service and the import and timing of statements and writings by Messrs. Wells and Slater. We address each in turn.

Respondent argues that Part 135 places the obligation to ensure an aircraft is airworthy on the certificate holder, in this case Richardson Aviation. Respondent further argues that, because the aircraft was in Part 135 service when the damage

occurred and the mechanics repaired it under the authority of Part 135, the rules of that part, rather than Part 91, apply.[5]

At the hearing, the Administrator argued, and the law judge found, that respondent's flight from Spokane to Seattle was a repositioning flight subject to Part 91 rather than a scheduled Part 135 flight. Accordingly, the law judge concluded that the Part 91 rules cited by the Administrator were properly applied to respondent. We agree that these Part 91 rules apply to respondent, but for additional reasons.

Parts 91 and 135 are not mutually exclusive. There are many circumstances where either or both may apply.[6] Part 91.1, Applicability, as pertinent, states its coverage as the **operation** of aircraft and, broadly speaking, contains flight rules and requirements applicable to those actually operating (i.e., flying) the aircraft. A review of Part 135 indicates it is considerably directed to the entity that controls the aircraft -- the company itself -- and in great part sets standards for the crew, service, and equipment the company offers. The rules cited by the Administrator here (with the exception of 91.165, which we

[5]If the rules cited by the Administrator did not apply, the complaint would be subject to dismissal.

[6]The same can be said for the relationship between Part 91 and Part 121, in the case of large transport carriers. Thus, in Administrator v. Frederick and Ferkin, NTSB Order EA-3600 (1992), we found that the pilot and first officer of a Part 121 flight had violated regulations in Part 91. See also Administrator v. MacQuarrie, NTSB Order EA-3649 (1992) (pilot of Part 135 flight found to have violated Part 91 rules) and Administrator v. Hite, NTSB Order EA-3652 (1992) (pilot of Part 135 flight found to have violated Part 91 and Part 135 rules).

agree is inapplicable) prohibit **persons** from operating aircraft under certain circumstances. On their face, the cited Part 91 rules apply to respondent because he was the pilot of the aircraft, not because other aspects of the flight were subject to that part.[7] Respondent, as pilot in command, is no less culpable for flying an unairworthy aircraft (in violation of § 91.29) because a Part 135 (or Part 121) owner/operator of the aircraft may also have had airworthiness responsibilities, or because mechanics working on the aircraft were acting pursuant to directions from the Part 135 or 121 operator.

Respondent next challenges the law judge's admission of a tape recording (and transcript thereof) made by Mr. Wells. Mr. Wells testified that, due to problems in the past dealing with Ms. Richardson, he took a tape recorder along to protect himself. As noted earlier, Mr. Wells testified to having advised respondent of numerous defects in the aircraft. Respondent denied being so told, and the Administrator, on rebuttal, offered a tape of a conversation among Messrs. Wells, Slater, and Brown to impeach respondent's testimony. The law judge admitted a portion of the tape for this purpose.[8]

The tape contains discussion among the two mechanics and

[7]The law judge was correct in that, if the aircraft was on a repositioning flight, its condition was subject to the rules in Part 91, not Part 135. But this is not determinative, in and of itself, of the rules applicable to respondent as the pilot.

[8]Respondent's claim of prejudice by an inability to cross-examine Mr. Wells' wife, who transcribed the tape, is frivolous.

respondent during which Mr. Wells advises respondent not to fly the aircraft and the dangers he saw in doing so.[9] Respondent does not deny Mr. Wells' testimony that the voices on the tape are theirs and Mr. Slater's. Respondent objects to the tape on the grounds that he was unaware he was being recorded, and that state and federal law preclude use of the tape or transcript as evidence.[10] The Administrator responds that federal law preempts state law here. He believes federal law authorizes use of the tape because it was made by a private individual, not the

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[9]A typical portion of the transcript (Exhibit C-2) reads as follows:

> Wells: That's right. And that's why Garret says if you have that indication right there that we're looking at, all those chopped up compressor blades, that you will do a gearbox inspection. So my theory is, my viewpoint is, that if you want to fly the airplane, you're on your own. And she's [Gina Richardson] on her own. I'm not approving it; I'm not signing it off; I don't want anything to do with it. I'll do the best I can to help you out, but I'm not taking any responsibility in the matter. And my recommendation is not to fly it until it has that gearbox inspection. So,
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> Respondent: You can tell her that and see what she says.
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> Wells: Well, I intend to.
>
> Respondent: But I know what she's going to tell me to fly this home. So I figure, "Well, I'm light and (indistinguishable), no revenue, Part 91, I can fly this home.
>
> Wells: Yeah, the only problem is, it's death. You can have a failure. You're looking at a major engine problem. And she needs to be well aware of that.

[10]According to respondent, Washington state law requires the consent of all parties or court order to intercept or record private conversations. Respondent also believes that the taping violated federal law, citing 18 U.S.C. 2510 et seq., the Omnibus Crime Control Act of 1968.

government, and that even illegally obtained evidence is usable for impeachment purposes.

Leaving aside policy reasons against uncontrolled eavesdropping and unlimited evidentiary use of its products, and as a matter of first impression, we have considerable difficulty with the notion that the conduct of our administrative proceedings is dictated by substantive state law regarding admission of evidence. [A]dmissibility issues are at the very heart of concerns appropriately regulated by the laws of the particular forum. U.S. v. McNulty, 729 F.2d 1243, 1255, 1265 (10th Cir. 1983). Our rules of practice at 49 C.F.R. 821 are the primary statement of evidentiary admissibility in our cases, and refer to the Federal Rules of Civil Procedure only as non-binding guidance.[11] Thus, assuming we are in any manner bound, it is to federal, not state, law.[12]

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[11]We will also assume for the purposes of this discussion, despite some considerable doubt, that respondent met the condition precedent of application of either the federal law or the Washington privacy act. That is, did he have a reasonable expectation of privacy. Quite likely, he did not. See United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971).

[12]Case law indicates that the only time a state law on the exclusion of electronically obtained evidence is implicated is when a state agent acquires the information, often pursuant to a state order. Therefore, for example, state laws have no effect in determining the admissibility of wiretap evidence in federal prosecutions when the evidence is obtained by federal agents in compliance with federal standards but in possible violation of more restrictive state law. See, e.g., McNulty, supra, and U.S. v. Proctor, 526 F. Supp. 1198 (D.C. D. Hawaii 1981), aff'd 694 F.2d 200 (9th Cir. 1982) (tape obtained through wiring of federal undercover agent is usable in federal proceeding without regard to state law). See also United States v. Hall, 543 F.2d 1229 (9th Cir. 1976).

As the Administrator argues, under federal law there is a recognized exception to use of evidence illegally obtained through electronic means. The evidence may be used to impeach a respondent/defendant's contrary testimony. See Harris v. New York, 401 U.S. 222, 225 (1970) (where defendant's statement, inadmissible in case-in-chief, was permitted to be used to impeach, and the Court stated: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. [Citations omitted.] Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.").[13]

Even more damaging to respondent's argument is the fact that Title III's prohibitions against use of a tape recording or transcript such as this do not apply when a party to the conversation consented to its "interception" and the interception is not for the purpose of committing a criminal or tortious act.[14] See Proctor, supra. Respondent does not argue that Mr.

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[13]See also U.S. v. Caron, 474 F.2d 506 (5th Cir. 1973).

[14]Title 18 U.S.C. 2511(2)(d) reads:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral or electronic communication, where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the

Wells' recording of their conversation was for a criminal or tortious purpose and there is no support in the record for such a conclusion.

Respondent also suggests that the fault here was that of the mechanics, in failing specifically and immediately to disapprove the aircraft for return to service, and in signing work orders containing preprinted return to service certifications. A critical problem with this argument is its inconsistency with the facts found by the law judge and supported in the record. It also ignores respondent's independent obligation as pilot in command.

Respondent knew or should have known that the aircraft was not airworthy. He disregarded Mr. Wells' advice not to fly the airplane. Neither mechanic had any duty under the regulations to make a log entry disapproving the aircraft's return to service. They wrote up and logged the work they had done and went farther, recommending that various procedures be undertaken to analyze the safety of the aircraft.

Contrary to respondent's argument, he could not have relied on or been misled by Mr. Wells' or Mr. Slater's signature on work orders containing preprinted return to service information because the log and work orders were not signed until **after**

(..continued)
Constitution of laws of the United States or any State.

respondent flew the aircraft from Spokane.[15] And, even assuming the truth of his statement that he saw the mechanics writing on work orders that contained preprinted return to service information, there is inadequate basis in the record to conclude as respondent alleges that, when he saw the mechanics writing as he left Spokane, he could reasonably assume they were writing return to service sign-offs.[16]

Respondent also argues that the airworthiness statements made by Messrs. Wells and Slater before they began their repair work are not relevant to the condition of the aircraft after completion of their work. However, there is no evidence that, as of the evening of February 19 (when respondent flew the aircraft from Spokane), Mr. Wells had changed his earlier advice -- the only expert advice evident on this record -- not to fly the aircraft. We see no other basis for respondent reasonably to believe the work done by the mechanics had rendered the aircraft airworthy for the flight from Spokane. Indeed, it appears that respondent was aware that Mr. Wells refused to enter the aircraft to conduct a test flight.

The law judge opined (Tr. at 227) that respondent was under pressure from his employer to return with the aircraft (the tape bears this out, see footnote 9), and he allowed this pressure to

[15]Tr. at 36 and Exhibit C-9 (logbook entry made and work orders filled out on February 20). Witness Wells testified that he did not even have a work order form with him at Spokane but used some plain note paper.

[16]Thus, that the mechanics dated the entries as of their starting, rather than completion, date is irrelevant.

overcome his safety obligation.

Finally, respondent argues that the 120-day sanction is too severe. We disagree. Administrator v. Bauer, 6 NTSB 870 (1989), cited by respondent, does not support sanction reduction. In that case, although the suspension was only 30 days, there is no indication that any mechanic told the pilot that the aircraft was dangerous to fly, and it was not. In Administrator v. Copsey, NTSB Order EA-3448 (1991), also cited by respondent, we affirmed a 60-day suspension for respondent's flight in an aircraft he should have known was unairworthy. However, where in that case respondent's action was found simply to be careless, here the law judge found that respondent's act in flying the plane out of Spokane was intentional and **reckless**.

Administrator v. Reid, 4 NTSB 934, 936 (1983), aff'd 765 F.2d 1457 (9th Cir. 1985), notes that "Board precedent and policy in respect to operation of an unairworthy aircraft has been to affirm sanctions depending upon the safety implications of the surrounding circumstances." In that case and others, 180-day suspensions were affirmed based on the operation of aircraft with known significant and substantial damage. The 120-day suspension here is not inappropriate under this standard and in light of precedent.[17]

[17]Because the Administrator has not appealed the sanction reduction and has not otherwise raised the issue by offering written agency policy guidance, we need not decide whether either a 180- or 120-day suspension must be affirmed based on the standard of deference contained in the FAA Civil Penalty Administrative Assessment Act of 1992.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The initial decision is affirmed as modified here; and

3. The 120-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.[18]

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[18]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).